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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,

Petitioners,

—against—

LIBERTY LOBBY, INC., and WILLIS A. CARTO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATION OF AMERICAN PUBLISHERS, CBS INC., CHICAGO TRIBUNE COMPANY, DOW JONES & COMPANY, INC., THE HEARST CORPORATION, THE MAGAZINE PUBLISHERS ASSOCIATION, THE MIAMI HERALD PUBLISHING COMPANY, NATIONAL BROADCASTING COMPANY, INC., NEWSWEEK, INC., THE NEW YORK TIMES COMPANY, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS/ SIGMA DELTA CHI, TIME, INC., TIMES MIRROR COMPANY, AND WESTINGHOUSE BROADCASTING AND CABLE, INC. IN SUPPORT OF PETITIONERS

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This brief is respectfully submitted, with the consent of all parties, pursuant to Rule 36 of the Rules of this Court, urging reversal of the decision below of the United States Court of Appeals for the District of Columbia Circuit, on the grounds that (1) constitutionally mandated legal standards established to protect freedom of expression must apply at the summary judgment stage as they do at all other stages of a libel action, and (2) any implication of the decision below that summary judgment is a disfavored remedy in actual malice libel cases should be rejected by this Court.

INTEREST OF AMICI

Amici include publishers of newspapers, magazines and books, and owners of major radio and television networks, involved in communicating news, information, and opinion to the American public, and organizations of persons or entities involved in such communication. Each of the *amici* is more fully described in the Appendix annexed hereto. They or their constituents are frequent targets of libel actions brought by public figures and public officials.

The question presented in this case is a matter of continuing and critical concern to *amici*. They or their constituents will be directly affected by this Court's resolution of the question now before it respecting the proper procedures and standards by which trial judges will determine whether public figure and public official libel cases may be disposed of on summary judgment.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is now well-settled that, in a libel case brought by a public figure or public official, the plaintiff must prove actual malice with "convincing clarity" to the satisfaction of both the trier of fact and courts reviewing the verdict. This case raises the question whether the "convincing clarity" standard must be *disregarded* when the defendant moves for summary judgment,

the point at which the district court must determine whether the plaintiff has sufficient evidence to require a trial. The court below held in the affirmative. The perverse result is to require trials even in cases where a district judge concludes that, if granted a trial, the plaintiff cannot possibly meet the applicable burden of proof.

Amici believe that this question should be resolved otherwise, in accordance with the vast majority of precedent on the issue. It requires no special rule crafted to protect speech or the press to conclude, on the basis of logic, precedent, the structure of the Federal Rules, and practical considerations, that a court engaged in the determination of whether a plaintiff deserves a trial must consider what it is that the plaintiff must establish to obtain a verdict. In all areas where the law supplies an elevated standard of proof, courts apply that standard in deciding motions for summary judgment. In a public figure libel case, the plaintiff must prove actual malice with "clear and convincing" evidence, a high standard carefully established to safeguard free speech from the punitive consequences of damages erroneously imposed by the imperfect fact-finding of civil litigation. Each of the arguments advanced by the Court of Appeals for disregarding plaintiff's "clear and convincing" burden at the summary judgment stage is fundamentally flawed; in fact the concerns discussed by that court, properly conceived, support a contrary result. The vast majority of decisions on this issue correctly reject the result reached on this issue below. (Point One).

If the Court of Appeals was suggesting that summary judgment is an inappropriate or disfavored remedy in actual malice libel cases, this implication should be rejected. Commonly, after discovery has been completed, it is clear that the plaintiff's burden of proof simply cannot be met. Such a case should, as a matter of sound judicial practice, be dismissed. Moreover, because freedom of speech is uniquely susceptible to the inhibiting effect of burdensome, punitive litigation, courts should be alert to avoid sending insufficiently supported libel cases to trial. Actual malice is a purposefully difficult standard to meet, and its proper, firm application to summary judgment motions will frequently result in pretrial dismissal. (Point Two).

ARGUMENT

POINT ONE

THE CONSTITUTIONAL REQUIREMENT THAT EVIDENCE OF ACTUAL MALICE IN A PUBLIC FIGURE LIBEL CASE BE "CLEAR AND CONVINCING" CANNOT BE DISREGARDED FOR PURPOSES OF A DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. The "Clear and Convincing" Standard in Defamation Cases Protects Important First Amendment Values

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964), the Court held that the common law rule of libel "compelling the critic of official conduct to guarantee the truth of all his factual assertions, and to do so on pain of libel judgments virtually unlimited in amount," was unconstitutional because it would inevitably lead to self-censorship of speech protected by the First and Fourteenth Amendments. The Court recognized that the test of actual malice—imposing on plaintiff the burden of proving with convincing clarity that the speech was known to be false or uttered in reckless disregard of the truth—is necessary precisely because of the imperfect nature of fact-finding in ordinary civil litigation. The basis of decision, then, was not to protect false speech, but to insulate speech believed by the author to be true from the vagaries and expense of courtroom adjudication. The Court held:

> Under . . . a rule [where truth alone is a defense], would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." *Speiser v. Randall*, . . . 357 U.S. [513] at 526 [(1958)]. The rule thus dampens the vigor and limits the variety of public debate.

> It is inconsistent with the First and Fourteenth Amendments.

376 U.S. at 279.

The "convincing clarity" (or "clear and convincing") requirement, one "which the constitutional standard demands," was invoked as an integral part of the actual malice test. 376 U.S. at 286. It has since been applied consistently by this Court in libel cases involving public officials or public figures, and was strongly reaffirmed last year in *Bose Corp. v. Consumers Union of the United States, Inc.*, 104 S.Ct. 1949, 1965 (1984).

The requirement of an elevated standard of proof as a constitutional imperative is, of course, not limited to First Amendment values. This Court has on occasion, under the command of the Fifth and Fourteenth Amendments, imposed elevated standards of proof upon proceedings jeopardizing other fundamental human rights. For examp[illegible] "clear and convincing" standard of proof is required by [illegible]rteenth Amendment in civil proceedings brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital. *Addington v. Texas*, 441 U.S. 418 (1979). The Court there noted that even though it may be argued whether "particular standard-of-proof catchwords" make a great difference in particular cases,[1] adopting a standard of proof is more than "an empty semantic exercise." *Id.* at 425. The elevated standard is in all cases an expression of the value placed by society on the interest at risk in the litigation. Accordingly, elevated standards are required in proceedings brought by the state to terminate the rights of parents in their natural child upon a finding of permanent neglect,

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1 In 1980, one of the counsel for *amici* was of the view that, although ready availability of summary judgment for defendants in libel suits was crucial to the vindication of principles enunciated in *New York Times Co. v. Sullivan*, *supra*, employment of the "convincing clarity" standard at that stage of the proceedings would probably have little impact on decisions in particular cases. R. Sack, *Libel, Slander, and Related Problems*, 549-50, 573-75 (1980). The decisional law since then, much of it cited in footnote 15 *infra*, in the wake of the *Hutchinson* footnote discussed in Part Two below, has convinced him that the effect has been substantially greater than was then supposed.

Santosky v. Kramer, 455 U. S. 745 (1982), and in denaturalization, expatriation and deportation proceedings, *Woodby v. Immigration and Naturalization Service*, 385 U. S. 276 (1966).[2]

It is a truism that in judicial proceedings "the factfinder cannot acquire unassailably accurate knowledge of what happened . . . [and] will sometimes, despite his best efforts, be wrong in his factual conclusions." *In Re Winship*, 397 U. S. 358, 370 (1970) (Harlan, J., concurring). The adoption of the "convincing clarity" standard in particular legal circumstances is a recognition that erroneous findings for plaintiffs in those cases is far more dangerous than erroneous findings for defendants.

The Court in *New York Times* thus fashioned the "clear and convincing" standard as a bulwark against jury punishment of speech that runs against the popular grain—*i.e.*, speech that is perceived at the moment to be "false." The issue is whether this vital protection is to take hold only when the speaker has been subjected to a full trial, and perhaps a verdict, or is to be preserved as a meaningful standard at all stages of litigation.

B. Courts Properly Consider Heightened Standards of Proof in Deciding Summary Judgment Motions

1. *A Comparison of Directed Verdict and Summary Judgment Motions Establishes that the "Clear and Convincing" Standard Must Be Employed in Deciding Both*

The "clear and convincing" evidence standard forms an integral element of the independent appellate review of libel judgments required by the First Amendment. *Bose Corp. v. Consumers Union of the United States, Inc.*, *supra*. Before that, of course, it must be the subject of a full and adequate charge to the jury. *New York Times Co. v. Sullivan*, *supra*. As

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2 As noted in *Woodby*, the clear and convincing standard of proof "is no stranger to the civil law," having been applied traditionally at common law in a variety of cases, such as civil fraud, adultery, illegitimacy of a child born in wedlock, lost wills, and oral contracts to make bequests. *Woodby v. Immigration & Naturalization Service*, 385 U. S. 276, 285 n.18 (1966).

recognized by the Court of Appeals below, the elevated standard is also critical to the decision of the trial court in ruling upon a motion for directed verdict under Rule 50 of the Federal Rules of Civil Procedure. Slip op. at 14. *See also Guam Federation of Teachers v. Ysrael*, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974); *Casano v. WDSU-TV, Inc.*, 464 F.2d 3 (5th Cir. 1972). The Court of Appeals below held nonetheless that the standard of proof was irrelevant to consideration of a dispositive summary judgment motion before the conduct of the trial. It is that holding which conflicts with constitutionally mandated protections described in Section A above, conflicts with the practices of federal courts in ruling upon motions for summary judgment in cases involving elevated standards of proof (including actual malice defamation cases), and conflicts with a rational and symmetrical application of the federal rules to achieve their manifest purposes.

Rule 50 provides that at the close of evidence offered by an opponent, a party may move for a directed verdict on the ground that his opponent has failed to make his case as a matter of law. The rule does not specify the standard to be applied by the court in ruling on the motion, but this Court has held that a directed verdict is appropriate "[w]hen the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict . . . ." *Brady v. Southern R. Co.*, 320 U.S. 476, 479-80 (1943). The motion for a directed verdict is described as serving two purposes: first, the saving of "time and trouble involved in a lengthy jury determination" of a meritless case. Second, "[i]t is something more. It is a method for protecting neutral principles of law from powerful forces outside the scope of law—passion and prejudice." 5A J. Moore, *Moore's Federal Practice* (hereinafter Moore), ¶ 50.02[1], 50-19 (2d ed. 1985), *quoting Rutherford v. Illinois C.R. Co.*, 278 F.2d 310, 312 (5th Cir.), *cert. denied*, 364 U.S. 922 (1960).

The conservation of judicial resources effected by the directed verdict motion is limited, coming as it does after the presentation of at least the plaintiff's case. The protection it

affords against jury passion and prejudice is, however, particularly pertinent in defamation cases, for the Court has often recognized that unfettered jury discretion to punish unpopular views is a direct threat to freedom of expression. *Bose Corp. v. Consumers Union of the United States, Inc.*, *supra*, 104 S. Ct. at 1965; *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971); *Rosenblatt v. Baer*, 383 U.S. 75, 88 n.15 (1966); *Herndon v. Lowry*, 301 U.S. 242, 261-63 (1937).

Rule 56 specifies that a motion for summary judgment may be brought before trial and granted upon the basis of evidence demonstrating that there is no "genuine issue" as to any "material fact," so that the moving party is entitled to "judgment as a matter of law." The twin elements that the contested fact be material and that the dispute be genuine cause the motion for summary judgment to be the functional equivalent of a motion for directed verdict.[3] In other words, "if it is clear that a verdict would be directed for the movant on the evidence presented at the hearing on the motion for summary judgment, the motion for summary judgment may properly be granted." 6 Moore, ¶ 56.15[3] at p. 56-479; 10A C. Wright & A. Miller, *Federal Practice & Procedure* (hereinafter "Wright & Miller") § 2725, pp. 103-04, *citing Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, 624 (1944). Accordingly, the test is also essentially the same: whether the evidence is such that reasonable jurors might differ as to its significance. 10A Wright & Miller, § 2725, pp. 106-09. The same purposes are also to be served as are served by a directed verdict, except that they are served in a more effective manner. The saving of judicial resources and expense to the litigants is greater because the motion occurs before the jury is empaneled and witness after witness takes the stand. Similarly, the risk of a result induced by passion and prejudice evaporates before the defendant is

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3 The differences between a motion for summary judgment and a motion for directed verdict relate almost exclusively to the time at which the adjudication is made and the fact that the evidence is by way of affidavit rather than live witnesses. *Agosto v. Immigration & Naturalization Service*, 436 U.S. 748, 770-71 n. 8 (1978) (Powell, J., dissenting).

driven by the prospect of trial litigation to monetary or other concessions.

Reading the two rules together, it becomes clear that, once the parties have been given an adequate opportunity to marshal evidence, the mission of the court is to determine at the earliest possible stage whether there is a case for the jury, *i.e.*, whether reasonable jurors could find for the opponent of the motion for judgment. In that calculus, the burden facing the opponent at trial is of obvious significance. Careful balancing of the rights of the litigants suggests that on summary judgment it is the burden of the moving party, whether or not bearing the burden of proof, to present to the court evidence establishing that party's right to judgment. It is then the responsibility of the opposing party to present sufficient evidence to enable that party to prevail before a jury of reasonable individuals. *See Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 160-61 (1970); *First National Bank v. Cities Service Co.*, 391 U.S. 253, 289 (1968). And if the opponent has the ultimate burden of persuasion, and particularly an enhanced burden of persuasion, that evidence must be such that reasonable jurors could find that burden to have been met. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 Yale L. J. 745, 747 (1974); Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 487-88 (1984) ("When the moving party does not have the burden of proof on the issue, he need only show that the opponent cannot sustain his burden at trial.")[4]

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4 It has been suggested that the ultimate burden of proof should have an even stronger influence upon the outcome of a summary judgment motion, so that a motion for summary judgment, without more, would put an opposing party with a burden of proof to the task of producing evidence sufficient to sustain a favorable verdict. Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 Chicago L. Rev. 72 (1977). On the other hand, Professor Moore has suggested that the burden never shifts on motion for summary judgment, but rather always remains with the movant, regardless of the ultimate burden at trial. 6 Moore, ¶ 56.15[3], 56-480 to 56-481. The distinction should not, however, affect the outcome of a motion for summary judgment such as is involved in the pending litigation. Professor Moore cites with apparent approval the decision of Judge Hand in *Dyer*

In sum, since courts properly consider a plaintiff's elevated standard of proof in deciding motions for directed verdict, it would be illogical *not* to do the same when a functionally equivalent motion for summary judgment is presented.

2. *Analysis of Independent Appellate Review Demonstrates that the "Convincing Clarity" Standard is Not Limited to Credibility Judgments Which Must Await Trial*

If the "convincing clarity" standard applied only to the fact finder's determinations of credibility, then the Court of Appeals would have been correct in disregarding the standard on summary judgment, because prior to trial such determinations are obviously impossible. But the "convincing clarity" standard is not applicable only to credibility judgments. In *Bose Corp. v. Consumers Union of the United States, Inc.*, *supra*, the Court, accepting the trial court's credibility finding that the testimony of the author of the article in question was not believable in crucial respects, nonetheless held that "the record [did] not contain *clear and convincing evidence* that [he] or his employer [the defendant] prepared" the article with actual malice. 104 S.Ct. at 1967 (emphasis supplied).

The teaching of *Bose*, then, is that "convincing clarity" is the standard employed during independent appellate review of libel judgments, even where the appellate court adopts or is bound by credibility findings of the trier of fact. So, too, on

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v. MacDougall, 201 F.2d 265 (2d Cir. 1952) to the effect that if the defendants in a slander action presented proof that the plaintiff would not have enough evidence to go to the jury on whether or not the defendants had made the utterances complained of, then "the judgment was right." *Id.* at 268. Further, he stresses that a party opposing summary judgment is subject to considerable risk, and justifiably so, "where he has made no attempt to avail himself of Rule 56(f) and on the papers before the court the moving party is entitled to summary judgment. Certainly the opposing party cannot hold back his evidence until trial. To permit that would stultify the summary judgment procedure." 6 Moore, ¶ 56.15[6] at p. 56-605 (footnote and citations omitted). Thus, an opposing party without countervailing evidence or the prospect of any, cannot secure a denial of the motion "on the basis of a hope that such evidence will develop at the trial." *Id.*, ¶ 56.15[3] at p. 56-481.

summary judgment, where the court assumes that the plaintiff's witnesses will be credited and the defendant's will not; if the plaintiff has not made a "clear and convincing" case, the defendant's motion should be granted.[5]

3. *In Other Contexts Courts Have Routinely Employed Similar Heightened Burdens of Proof on Summary Judgment*

Summary judgment is an inquiry into the *sufficiency* of the plaintiff's evidence,[6] and that inquiry can only be undertaken by reference to what it is that he must prove to get to a jury at trial. Plaintiff must show that there are *genuine* issues of *material* fact, Fed. R. Civ. P. 56(c), and materiality of facts simply cannot be determined in a vacuum.[7] In short, "[b]y

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5 Because plaintiffs are required to marshal their evidence at the summary judgment stage, the district judge in *Bose* presumably had before him in 1981 substantially the same evidence that this Court considered while exercising independent review on appeal in 1984, albeit the testimony was in deposition, rather than trial transcript, form. If so, surely the plaintiff, the defendant, the courts and the First Amendment would have been better served had judgment been granted to the defendant by the district court, employing the "convincing clarity" standard and disregarding witness credibility, than by this Court, years and a long trial later, also employing the "convincing clarity" standard and disregarding witness credibility.

6 *See, e.g., Southway Theatres, Inc. v. Georgia Theatre Co.*, 672 F.2d 485, 495 (5th Cir. 1982); Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 470 (1984).

7 *See, e.g., Bandelin v. Pietsch*, 98 Idaho 337, 563 P.2d 395, 399, *cert. denied*, 434 U.S. 891 (1977):

> "When a defendant's communications are constitutionally privileged, a plaintiff cannot prevail at trial unless he establishes malice with convincing clarity. This is the standard against which the court must examine the evidence on motion for summary judgment because this is the standard that determines materiality of disputed questions of facts."

Many courts have stated that a "material" fact is one that is outcome-determinative under the applicable law. *E.g., Big O Tire Dealers, Inc. v. Big O Warehouse*, 741 F.2d 160, 163 (7th Cir. 1984); *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976).

entering summary judgment the Court is, in effect, concluding that, *based on the evidence upon which the plaintiff intends to rely at trial*, no reasonable jury could return a verdict for the plaintiff." *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 463 (9th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) (emphasis supplied).

Federal courts considering summary judgment motions do, in fact, consistently recognize heightened burdens of proof in determining whether evidence has been elicited sufficient to present an issue reasonably subject to jury adjudication. For example:

- Where union liability for damage caused by an unlawful strike depends on "clear, unequivocal and convincing" proof that it authorized or ratified the strike, summary judgment will be granted in favor of the union if the plaintiff "cannot prevail on the merits" by meeting that high standard of proof. *Falls Stamping & Welding Co. v. International Union*, 744 F.2d 521, 526-27 (6th Cir. 1984) ("The Company's allegations that were made in the district court, even if true, would not affect the result, based on [the clear and convincing standard].")

- Where a fraud suit requires clear and convincing evidence of intent to deceive, summary judgment will be granted where the evidence of intent produced in opposition to the motion could not reasonably be viewed as clear and convincing. *United States v. Thompson*, 210 F.2d 724, 726 (D. C. Cir. 1953) ("Of course we do not say the [defendant] did not intend to deceive. On the whole there are indications that he did. But such indications are not enough. Fraud must appear by clear and satisfactory, or convincing, evidence.")

- Where plaintiff's suit for reformation of a contract requires "clear, unequivocal and convincing" evidence of fraud, defendant's summary judgment motion will be considered in light of that high standard. *Hutcheson v. Frito-Lay, Inc.*, 315 F.2d 818, 821 (8th Cir. 1963).

- Where a "clear and patent violation" of the statute must be shown to entitle plaintiff to an injunction in a private suit, defendant will prevail on motion for summary judgment if plaintiff's opposition shows that he will not be able to meet that high standard. *Aaacon Auto Transport, Inc. v. Medlin*, 575 F.2d 1102, 1103-04 (5th Cir. 1978).

- Where proof of an antitrust conspiracy from circumstantial evidence requires that the inference of unlawfulness be "compelling", that standard will be applied on summary judgment in favor of defendants. *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 463 (9th Cir. 1981).

- Where a claimant to title bears a "heavy burden" of proving adverse possession, and the law supplies a special presumption against his claim, these rules will be applied in granting defendant's motion for summary judgment. *United States v. Gossett*, 416 F.2d 565, 568 (9th Cir. 1969), *cert. denied*, 397 U.S. 961 (1970).

- Where a plaintiff seeking to invalidate a statute or regulation must show "clear and convincing proof that there is no rational basis for the legislation," that standard is relevant to the analysis leading to grant of summary judgment sustaining the enactment. *Michigan Meat Ass'n v. Block*, 514 F.Supp. 560, 565 (W.D. Mich. 1981).

- Where a lawsuit challenging imposition of a trusteeship on a local by the international union requires "clear and convincing proof" that it was not established "in good faith," 29 U.S.C. § 464(c), summary judgment will be granted for the international defendant in light of that standard. *Miller v. Laborer's International Union*, 82 Lab. Cas. (CCH) ¶ 10,231 at p. 16,894 (D.D.C. 1977).

Indeed, where the law supplies presumptions that tip the evidentiary burden in favor of one of the parties, that party

generally gets the benefit of such presumptions upon summary judgment.[8] By the same token, when the party *moving* for summary judgment bears a heightened burden of proof, courts routinely consider that in assessing that party's motion.[9] These cases merely underscore the general proposition that a court must consider any summary judgment motion in light of the applicable standard of proof.

That courts consider the presence of an especially high standard of proof on summary judgment motions does not mean, of course, that the party bearing it always loses. *See, e.g., Rebozo v. Washington Post Co.*, 637 F.2d 375, 381 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981). *Rebozo* squarely held that the public figure libel plaintiff must show that he can meet the "higher standard" of "clear and convincing" evidence to withstand summary judgment, and proceeded to determine that on the particular facts of the case the plaintiff had done

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8 *E.g., Wermager v. Cormorant Township Board*, 716 F.2d 1211, 1214 (8th Cir. 1983); *Tee-Pak, Inc. v. St. Regis Paper Co.*, 491 F.2d 1193 (6th Cir. 1974); *Engl v. Aetna Life Insurance Co.*, 139 F.2d 469, 472 (2d Cir. 1943) (Clark, J.) (evidence presented on motion must be "construed in the light of the underlying law . . .").

9 *See, e.g., Toney v. Bergland*, 645 F.2d 1063, 1066 (D.C. Cir. 1981) (reversing grant of summary judgment: "The losing party is especially entitled to the benefit of reasonable factual doubt where, as here, the successful party had the burden to make his case by 'clear and convincing' evidence."); *THI Hawaii, Inc. v. First Commerce Financial Corp.*, 627 F.2d 991, 995 (9th Cir. 1980) (where an antitrust defendant would be absolved of liability by meeting a stringent "but for" test as to plaintiff's complete involvement in the conspiracy, summary judgment is properly granted for the defendant when his motion papers show that he has "met this high burden of proof"); *United States v. Prince*, 348 F.2d 746, 748 & n.3 (2d Cir. 1965) (summary judgment for government, asserting fraud, is reversed; government bore "clear and convincing" burden and its "moving papers furnish no factual basis for a finding *that the burden is met*") (emphasis supplied); *Kangaroos U.S.A., Inc. v. Caldor, Inc.*, 585 F.Supp. 1516 (S.D.N.Y. 1984) (where a defendant alleges that the patent in suit is unenforceable because of fraud on the patent office, he may win a summary judgment motion, but only by satisfying the "clear and convincing proof" standard that applies to claims of fraud).

so. Again, this result is consistent with what courts do in other areas of the law.[10]

The reasoning and result of the Court of Appeals below creates out of whole cloth an exception to this analysis. The question, then, is whether the reasons given for fashioning this idiosyncratic rule for actual malice libel cases support the decision below.

C. The Court of Appeals' Reasons for Disregarding the Applicable Standard of Proof in Libel Summary Judgment Motions are Untenable

The Court of Appeals employed three arguments in support of its result. They are (1) that acknowledging the standard of proof the plaintiff must meet at trial at the summary judgment stage would force the plaintiff to marshal all the facts supporting his case, which was seen as inconsistent with the "threshold" nature of a summary judgment motion, (2) that this Court's dictum in *Hutchinson v. Proxmire*, 443 U.S. 111, 120 & n.9 (1979), implies disregard of the requirements of a libel plaintiff's prima facie case at the summary judgment stage, and (3) that the distinction between "probable cause" and "beyond a reasonable doubt" in the criminal law analogously suggests such disregard. Each of these arguments is fundamentally flawed. The first ignores actual summary judgment procedure and its role in civil litigation; the second reads far more into the *Hutchinson* footnote than *amici* believe was intended; the third mischaracterizes criminal procedure and results in a false analogy.

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10 *See, e.g., Hawkins v. Hawkins*, 271 F.2d 870, 875 (5th Cir. 1959) (proof of intent to change beneficiary on insurance policy must be "clear and convincing"; party bearing this burden withstands summary judgment when, opposing motion, she makes "exceptionally strong case" sufficient to meet that burden if her version of facts is credited at trial); *Hotel & Restaurant Employees & Bartenders Int'l Union v. Rollison*, 615 F.2d 788, 793 (9th Cir. 1980) (party bearing "clear and convincing" standard shows sufficient facts, in opposing summary judgment, to meet that standard).

1. *Summary Judgment Requires the Non-Movant to Marshal His Evidence*

The Court of Appeals' novel characterization of summary judgment as a "threshold" proceeding, and its surprising suggestion that a libel plaintiff should not be compelled to disclose his most persuasive evidence then, are contrary to settled principles of summary judgment practice. In seriously contested lawsuits, summary judgment motions are ordinarily made and decided at the close of often voluminous discovery, not at the "threshold."[11] They are powerful tools to regulate court business efficiently by screening out cases that do not require a trial, thereby conserving resources of the courts as well as those of the parties, *including the plaintiff*, who is put to as much needless expense by trying a case he cannot win as is the defendant.

Prior to the decision below, federal courts had been unanimous that a party against whom summary judgment is sought must show all—or at least his best—evidence at peril of dismissal. Judge Charles E. Clark, who as Dean of Yale Law School had been reporter of the Rules Advisory Committee at the time of the principal drafting of the Federal Rules,[12] explained the philosophy of Rule 56 in one of the earliest decisions on the subject:

> If one may . . . reserve one's evidence when faced with a motion for summary judgment there would be little opportunity "to pierce the allegations of fact in the pleadings" or to determine that the issues formally raised were in fact sham or otherwise unsubstantial. It is hard to see why a litigant could not then generally avail himself of this means of delaying presentation of his case until the

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11 If the motion is made before material discovery is complete, the federal rules contemplate that the court will defer decision until the non-movant has had an opportunity to complete all relevant discovery. Fed. R. Civ. P. 56(f).

12 Judge Clark's major role in developing the Federal Rules of Civil Procedure is described in 4 Wright & Miller, *supra*, § 1004 at pp. 45-46.

> trial. So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any one of the applicable decisions.

Engl v. Aetna Life Insurance Co., 139 F.2d 469, 473 (2d Cir. 1943). Decisions expressing the same view are legion:

> [A] litigant faced with a sufficiently supported motion for summary judgment cannot simply sit back and say "I have a good answer to all this but I won't disclose it now."

In re B.D. International Discount Corp., 701 F.2d 1071, 1077 n.11 (2d Cir.), *cert. denied*, 104 S.Ct. 108 (1983).

> No longer may a [litigant], under Federal Practice, play a game of hide and seek, refuse to show his hand, and thus place on the trial court and the opposing party, the unnecessary burden of facing a long, arduous and expensive trial.

United States v. Gossett, 416 F.2d 565, 568 (9th Cir. 1969).

> A party opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial, for in doing so he risks the possibility that there will be no trial. A summary judgment motion is intended to "smoke out" the facts so that the judge can decide if anything remains to be tried.

Donnelly v. Guion, 467 F.2d 290, 293 (2d Cir. 1972).[13]

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13 *See also, Otteson v. United States*, 622 F.2d 516, 520 (10th Cir. 1980); *Inland Oil & Transport Co. v. United States*, 600 F.2d 725, 728 (8th Cir.), *cert. denied*, 444 U.S. 991 (1979); *Downes v. Beach*, 587 F.2d 469, 472 (10th Cir. 1978) (party opposing summary judgment has affirmative duty to bring his evidence to court's attention, at peril of dismissal); *Golden Oil Co. v. Exxon Co.*, 543 F.2d 548, 551 (5th Cir. 1976); *E.P. Hinkel & Co. v. Manhattan Co.*, 506 F.2d 201, 205 (D.C. Cir. 1974); *Bland v. Norfolk & So. R. Co.*, 406 F.2d 863, 866 (4th Cir. 1969); *Turner v. Lundquist*, 377 F.2d 44, 48 (9th Cir. 1967); *Robin Construction Co. v. United States*, 345 F.2d 610, 613 (3d Cir. 1965).

2. *The* Hutchinson *Footnote Does Not Address Standards of Proof*

The Court of Appeals' reliance on the dictum in *Hutchinson v. Proxmire*, 443 U.S. 111, 120 & n.9 (1979) is also off the mark. In *Hutchinson*, this Court commented on the proposition that "summary judgment might well be the rule rather than the exception" in actual malice libel cases:

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule". The proof of "actual malice" calls a defendant's state of mind into question, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and does not readily lend itself to summary disposition. *See* 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2730, pp. 590-592 (1973). *Cf. Herbert v. Lando*, 441 U.S. 153 (1979). In the present posture of the case, however, the propriety of dealing with such complex issues by summary judgment is not before us.

This dictum, which is more fully discussed in Point Two *infra*, neither explicitly nor implicitly bears on the standard of proof to be applied at the summary judgment stage. Nothing in *Hutchinson* or in any other decision of this Court even suggests that the district court, using the proper *manner* of examination of the facts, measures the evidence against any *standard* other than the "clear and convincing" standard enunciated in *New York Times*. Certainly the footnote does not mean that defendants in libel cases should be subject to disfavorable rules of procedure not applied elsewhere, the result apparently reached below. Indeed, most courts have construed the footnote as mandating summary judgment procedures in libel cases that are no different from those applied in other contexts. *See, e.g., Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932, 940 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980).[14]

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14 The Libel Defense Resource Center, an organization that monitors and compiles information and statistics concerning media litigation, reports that, since the *Hutchinson* decision, 76% of the 114 reported libel summary

And, as we have seen, courts in other areas of the law regularly determine summary judgment motions in accordance with applicable standards of proof.

3. *The Analogy to Criminal Procedure Underscores the Error Below*

The Court of Appeals' analogy to the "probable cause" standard in criminal cases (Slip op. at 12) is ill-founded. The court confused two distinct tests that apply at two different stages of both civil and criminal litigation: the standard that must be met to initiate a proceeding and that which must be satisfied to get it to a jury.

Because of the serious consequences of criminal charges, a criminal proceeding may be *initiated* only by indictment or information grounded in "probable cause" to believe an offense has occurred. The analogy in civil procedure is to Fed. R. Civ. P. 11, which requires merely a reasonable belief that facts might be established to support a claim, not a showing that they have been established. *See Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980). That standard, however, falls far short of what a civil plaintiff must adduce to survive a motion for summary judgment. There, he must demonstrate that he *can* prove his case with sufficient evidence.

Federal criminal law has no counterpart to summary judgment. *See United States v. Calandra*, 414 U.S. 338, 345 (1974) (indictment regular on its face cannot be dismissed before trial for insufficient evidence). The criminal motion for acquittal, Fed. R. Crim. P. 29, however, is precisely analogous to a civil directed verdict, which in turn employs the same standard used for testing evidentiary sufficiency as is required on summary judgment (*see* pp. 6-10, *supra*). As the Court of Appeals below recognized, motions for acquittal are judged by whether a reasonable jury could find guilt upon the "heightened stan-

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judgment decisions in actual malice cases have explicitly applied a "neutral" approach to summary judgment. *See* Libel Defense Resource Center, Study No. 6, Bulletin No. 12 (Dec. 31, 1984) *and* Bulletin No. 4, Part 2 (Oct. 15, 1982).

dard" of beyond a reasonable doubt that is mandated by substantive criminal law (Slip op. at 12). Analogously, civil motions for directed verdict and, hence, for summary judgment employ whatever legal standard is supplied by the substantive law, such as the "heightened standard" required in public figure libel cases. In short, the analogy to criminal procedure not only does not support, but strongly undercuts, the analysis of the court below.

D. Conclusion: The Court of Appeals' Holding Must Be Rejected

Summary judgment is a procedure designed to avoid trials of cases that a party cannot win, because to answer the motion the party is required to produce sufficient facts to demonstrate that he can survive a directed verdict. This salutary and well-understood procedure was emasculated by the decision below under which, in a public figure libel case, the parties may be speeded on their way to trial even if the plaintiff fails to demonstrate that he has enough evidence to win before a reasonable jury.

This Court should therefore reaffirm the conclusion of the vast majority of federal and state courts, which have agreed that the "clear and convincing" standard is relevant and must be met by the public figure or public official plaintiff on a libel defendant's motion for summary judgment:

> [A] judge in denying a defendant's summary judgment motion must conclude that, based on the evidence asserted in the plaintiff's affidavits, a reasonable jury could find malice with convincing clarity.

Yiamouyiannis v. Consumers Union of the United States, Inc., *supra*, 619 F.2d at 940.[15]

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15 *Accord* (appellate courts): *Rebozo v. Washington Post Co.*, 637 F.2d 375, 381 (5th Cir. 1981); *Fadell v. Minneapolis Star & Tribune Co.*, 557 F.2d 107, 108 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977); *Carson v. Allied News Co.*, 529 F.2d 206, 208 (7th Cir. 1976); *Cervantes v. Time, Inc.*, 464 F.2d 986, 995 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Reader's Digest Ass'n*

POINT TWO

IF THE ACTUAL MALICE TEST IS FIRMLY AND CONSCIENTIOUSLY APPLIED, SUMMARY JUDGMENT WILL FREQUENTLY BE GRANTED IN PUBLIC FIGURE LIBEL CASES

A. The Actual Malice Test Applied to Libel Suits Properly Results in Frequent Summary Judgments for Defendants

The Court of Appeals' refusal to apply the "convincing clarity" standard appears to contain an implicit message generally downgrading the significance and availability of summary judgment in public figure libel cases. It takes the *Hutchinson* footnote several steps beyond its meaning, in a direction *amici* submit is unwise and unsupportable. In this larger sense the decision below requires some reconsideration of why summary judgment for defendants in such cases is, has been and should be readily available and frequently granted.

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v. Superior Court, 37 Cal.3d 244, 690 P.2d 610, 614, 208 Cal. Rptr. 137, 141 (1984); *DiLeo v. Koltnow*, 200 Colo. 119, 613 P.2d 318 (1980); *Nader v. de Toledano*, 408 A.2d 31 (D.C. Ct. App. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Lampkin-Asam v. Miami Daily News, Inc.*, 408 So.2d 666, 668 (Fla. Dist. Ct. App.), *pet. denied*, 417 So.2d 329 (Fla.), *cert. denied*, 459 U.S. 806 (1982); *Sigman v. Gove*, 169 Ga. App. 580, 314 S.E.2d 238 (1984); *Mehau v. Gannett Pacific Corp.*, 66 Haw. 133, 658 P.2d 312, 321 (1983); *Bandelin v. Pietsch*, 98 Idaho 337, 563 P.2d 395, 399, *cert. denied*, 434 U.S. 891 (1977); *National Ass'n of Government Employees, Inc. v. Central Broadcasting Corp.*, 379 Mass. 220, 396 N.E.2d 996, 1003 (1979), *cert. denied*, 446 U.S. 935 (1980); *Tucci v. Guy Gannett Publishing Co.*, 464 A.2d 161, 166 (Me. 1983); *Bukky v. Painesville Tel. & Lake Geauga Printing Co.*, 68 Ohio St.2d 45, 428 N.E.2d 405, 407 (1981); *Koch v. Laborico*, 66 Or. App. 78, 674 P.2d 602, 607 (1983), *rev. denied*, 296 Or. 712, 678 P.2d 740 (1984); *Brophy v. Philadelphia Newspapers*, 281 Pa. Super. 588, 422 A.2d 625, 632 (1980); *Mark v. Seattle Times*, 96 Wash.2d 473, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982); *Chase v. Daily Record, Inc.*, 83 Wash.2d 37, 515 P.2d 154, 157 (1973).

Contra (appellate courts): *American Benefit Life Ins. Co. v. McIntyre*, 375 So.2d 239, 249 (Ala. 1979); *Green v. Northern Publishing Co.*, 655 P.2d 736 (Alaska 1982), *cert. denied*, 463 U.S. 1208 (1983); *Wise v. Dallas Southwest Media Corp.*, 596 S.W.2d 533, 536 (Tex. Civ. App. 1979).

Amici urge that it is not analytically helpful to dwell on the question whether summary judgment is the "rule" or the "exception" in actual malice cases. Any conclusion in those terms is necessarily ambiguous. Certainly the Court has never said that summary judgment is the "rule" in that there is a presumption or bias in favor of summary judgment for defendants that ought to be at work in public figure or public official cases irrespective of their facts. "[T]he question whether summary judgment is appropriate in any case is one to be decided on the particular facts of that case." *First National Bank v. Cities Service Co.*, 391 U.S. 253, 259 (1968). But in the sense of describing the outcome of such motions in actual malice libel suits, summary judgment may surely be said to be the "rule" insofar as courts on the particular facts before them tend to grant such motions for defendants more often than they deny them.[16] *Cf. Dun & Bradstreet v. Greenmoss Builders, Inc.*, 53 U.S.L.W. 4866, 4871 (1985) (White, J., concurring) ("[The public figure or public official plaintiff] frequently loses on summary judgment or never gets to the jury because of insufficient proof of malice.")[17]

The actual malice standard is and is intended to be "exceedingly difficult to satisfy." *Id.* Publication of news by the media with actual malice, *i.e.*, knowledge of falsity or subjective awareness of probable falsity, is unusual. Reporters and editors may get their facts wrong from time to time, occasionally as a result of failure to exercise due care. But they have little

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16 Post-*Hutchinson* compilations by the Libel Defense Resource Center cited in footnote 14, *supra*, show that summary judgments were granted in 76% of actual malice cases from 1980 to 1984.

17 The vast majority of federal criminal cases result in convictions. *See* Annual Report of the Director of the Administrative Office of the United States Courts, 1984, Appendix Table D-4 (81% of total defendants convicted within reporting period). It would thus be correct, descriptively, to say that "convictions are the rule, rather than the exception, in federal criminal cases." Such a statement would of course be entirely wrong, though, were it taken to mean that there is a special rule of criminal law or procedure favoring criminal prosecution, or that the courts are predisposed to convict irrespective of the facts of the particular cases before them.

incentive, if any, to lie to their own readers and viewers. Rarely do they do so.

Because actual malice involves the "state of mind" of the defendant, however, *Herbert v. Lando*, 441 U.S. 153, 160 (1979), in many cases the fact that defendants did not harbor actual malice at the time of publication cannot become clear until the broad discovery permitted by *Herbert* is complete and a motion for summary judgment has been made. When the facts as to what the reporter did, what documents he referred to, who his non-confidential sources were and what they told him (much of that usually unknown by anyone other than defendants at the outset of the litigation) are not materially disputed at summary judgment, as is often the case, the district court is well equipped to determine whether the inferences the plaintiff would draw from those facts would be constitutionally sufficient to prove actual malice with convincing clarity. Whether or not called a "rule", then, summary judgment for media defendants is common in actual malice cases.[18]

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18 This Court has observed that in other contexts, *e.g.* qualified protection for the acts of public officials, summary judgment was rarely—indeed, *too* rarely—available when "state of mind" was in issue. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982). But in actual malice libel cases, summary judgment is frequently granted *despite* the fact that actual malice is a "state of mind." *Amici* suggest that this is so for a variety of reasons, including the fact that the burden of proving actual malice is on the plaintiff, that it must be proved with "convincing clarity," that the relevant proof is often "in the form of objective evidence" (*Herbert v. Lando*, *supra*, 441 U.S. at 160) available at the time the motion is made, and that, as suggested above, discovery rarely provides substantial evidence that defendants were guilty of it.

> A party against whom summary judgment is sought is not entitled to a trial simply because he has asserted a cause of action to which state of mind is a material element. There must be some indication that he can produce *the requisite quantum of evidence* to enable him to reach the jury with his claim.

Hahn v. Sargent, 523 F.2d 461, 468 (1st Cir. 1975) (emphasis supplied), *cert. denied*, 425 U.S. 904 (1976), *citing Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966) *cert. denied*, 385 U.S. 1011 (1967) (public official libel case).

The extraordinarily high rate of reversals of libel verdicts on appeal for want of constitutionally sufficient evidence of actual malice suggest that, if anything, increased use of summary proceedings is required. The reversal rate demonstrates that (1) the media have been subjected to unnecessary trials to an extent unmatched by any other class of defendants known to *amici* and (2) juries are regularly returning verdicts against the press that are constitutionally infirm and, it may be inferred, premised not on the law as charged but on constitutionally invalid grounds such as punishment of unpopular speech.[19] Untold damage is done to plaintiffs, defendants, the judicial system, and free discourse by these consistent misadventures.

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19 Two substantial studies commissioned by the American Bar Foundation have demonstrated the burdens inflicted upon defamation defendants by trials which produce jury verdicts vacated on motion or reversed on appeal. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, American Bar Foundation Research Journal, Vol. 1980, Summer No. 3, 457; Franklin, *Suing Media for Libel: A Litigation Study*, American Bar Foundation Research Journal, Vol. 1981, Summer No. 3, 797. In both studies, a very small percentage of plaintiffs emerged from the appellate process with judgments. In cases that went to trial, plaintiffs received a significant percentage of jury verdicts; but more than one-half of such verdicts were lost on appeal.

More recent studies by the Libel Defense Resource Center show that plaintiffs won 67% of trial decisions in actual malice cases tried to juries or courts in 1980-84. Judgments for all types of libel plaintiffs after a trial, however, were reversed and the case dismissed in 57% of appeals decided during the same time period. Libel Defense Resource Center, Bulletin No. 11 at 11, 20 (Nov. 15, 1984). This may be compared to the overall reversal rate in the federal courts of appeal for private civil litigation, which, according to the most recent figures, is 18.7%. Annual Report of the Director of the Administrative Office of the United States Courts, 1984, Appendix Table B-1. (The report covers cases disposed of during the 12-month period ended June 30, 1984. The figure quoted is for "other private civil" appeals, excluding criminal cases, prisoner petitions, civil litigation involving the government, bankruptcy, administrative appeals and original proceedings.)

B. Firm Enforcement of Summary Judgment Procedure is Peculiarly Important Where Litigation May Be Motivated by the Desire to Silence or Harass

All persons, of course, are entitled to the protection of the law of libel. The case at bar, however, exemplifies the particular need for full availability of summary judgment for the expeditious disposition of groundless libel suits that may be intended to silence opposing voices. "[M]any self-perceived victims of defamation are animated by something more than a rational calculus of their chances of recovery. Given the circumstances under which libel actions arise, plaintiffs' pretrial maneuvers may be fashioned more with an eye to deterrence or retaliation than to unearthing germane material." *Herbert v. Lando*, *supra*, 441 U. S. at 204-05 (Marshall, J., dissenting). The *Sullivan* case was itself an example—a suit apparently brought to punish those who ran an advertisement attacking police actions in the South against civil rights protesters. The suit seemed to be part of a larger effort to silence or punish segments of the press perceived to be at odds with local sentiment. *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at 278 n.18; *id.* at 294-95 (Black, J., concurring).

Respondent Liberty Lobby has made something of a career of unsuccessfully suing its critics for libel and related torts.[20] It

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20 In 1962, Liberty Lobby's chairman sued Drew Pearson for libel in characterizing his congressional testimony as "anti-Semitic." Summary judgment was granted to defendant on grounds of truth. *Dall v. Pearson*, 246 F. Supp. 812 (D.D.C. 1963), *aff'd*, No. 18,414 (D.C. Cir. Oct. 22, 1964), *cert. denied*, 380 U.S. 965 (1965). Thereafter, Pearson published papers belonging to Liberty Lobby and its founder and chief executive, Willis Carto, that exposed Carto's animosity toward Jews. Liberty Lobby sued to enjoin publication, and lost. On appeal, then-Circuit Judge Burger's opinion noted the "reprehensible" "overtones of anti-Semitism and racism" in Liberty Lobby's publications and activities. *Liberty Lobby v. Pearson*, 390 F.2d 489, 491 n.7 (D.C. Cir. 1967). In the 1970s, Liberty Lobby sued the Anti-Defamation League of B'nai B'rith for alleged interference with contractual relations; the ADL had informed radio stations carrying Liberty Lobby programs that the group was anti-Semitic. *Liberty Lobby v. Anti-Defamation League*, No. 76-760-1 (D.Ct. McLennan Co., Tex.). The suit was

is not alone. There is ample evidence that the "lawsuit as a weapon" has been discovered by groups committed to suppressing speech critical of their activities.

The Synanon Church, for example, has been judicially described as an organization involved in "repeated attacks and threats of violence . . . against those perceived as enemies of the organization." *Synanon Church v. United States*, 579 F. Supp. 967, 971 (D.D.C. 1984). In addition to acts of physical violence against its "enemies" and the willful destruction of evidence for the purpose of disguising its true nature from others in litigation in which it is involved (*id.* at 972-74), Synanon embarked upon a massive nationwide campaign of retraction demands, followed by the bringing of a number of defamation actions to stifle adverse comment. *Reader's Digest Ass'n v. Superior Court*, 37 Cal. 3d 244, 255-56, 690 P.2d 610, 617, 208 Cal. Rptr. 137, 144 (1984). For a time, the rash of suits caused many publications, particularly smaller newspapers, to "ease up" in their coverage. After years of litigation with Synanon, a major newspaper group, having had its case reach the California Supreme Court, paid a substantial settle-

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withdrawn before any decision on the merits. Liberty Lobby sued William Buckley's *National Review* for libel in linking it with the United States Labor Party and related groups, some of whose activities were described as being pro-Palestinian and anti-Semitic; summary judgment was granted for defendant. *Liberty Lobby v. National Review, Inc.*, Civ. Action No. 79-3445 (D.D.C., June 17, 1983). Liberty Lobby has been denounced as anti-Semitic in Congress, *see*, Cong. Rec., July 18, 1974 at 24201, and in writing by its own former general counsel. *See, e.g.*, Washington Post, Apr. 26, 1981, at p. A4. Undaunted, Liberty Lobby now has libel suits pending against, among others, present *amicus* Dow Jones & Company, Inc., whose *Wall Street Journal* referred to it as "anti-Semitic." *Liberty Lobby v. Dow Jones & Co., Inc.*, Civ. Action No. 84-3445 (D.D.C., filed Nov. 15, 1984). And, of course, in the present suit Liberty Lobby sued columnist Anderson for, among other things, calling it and Mr. Carto anti-Semitic—a claim that, even under the Court of Appeals' analysis, did not survive summary judgment. Meanwhile, however, as a result of that same analysis, the defendants must stand trial on questions such as whether they truly believed that Mr. Carto transacts business from public phone booths.

ment sum to get rid of the costly and time consuming litigation.[21]

The Church of Scientology, which has been described as having a "practice of harassing its 'suppressors' " (*Church of Scientology v. Dept. of State*, 493 F. Supp. 418, 421 (D.D.C. 1980)), is another example. It has initiated a spate of libel suits against former Church members, authors and the media.[22]

Litigation itself, regardless of its outcome, provides such litigants with ample tools for harassment. As the Court noted in an opinion concerning policy grounds for limiting the spread of fraud actions under the federal securities laws, there is a "danger of vexatious litigation" since "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1974).

These concepts apply with extraordinary force in defamation actions brought against the media by public officials and public figures. "For the stake here, if harassment succeeds, is free debate." *Washington Post Co. v. Keogh*, 365 F.2d 965, 967-68 (D.C. Cir. 1966) (function of summary judgment in libel cases).

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21 *See Leaning on the Press*, Newsweek, Nov. 20, 1978, at 133 and *The Trouble at Synanon*, Newsweek, June 26, 1978, at 31.

22 *See The Limits for Libel*, The New York Times, July 29, 1983, at 23, col. 2; *Leaning on the Press*, Newsweek, *supra*; and *Cults in America and Public Policy*, Congressional Quarterly, Editorial Research Reports—The Report, Vol. 1, No. 14, p. 267 (Apr. 13, 1979).

C. Summary Judgment is an Important Means of Implementing the Goals of *New York Times Co. v. Sullivan*

It would be mistaken, *amici* submit, to suggest that the protection for speech and the press that was thought to have been established by the *New York Times* actual malice test may be used as an argument for diminishing the role summary judgment would ordinarily play in civil litigation, or to consider evenhanded but firm adherence to general summary judgment procedures in libel cases a form of "double counting" in favor of defendants. *Cf. Calder v. Jones*, 104 S.Ct. 1482, 1488 (1984). When objectively reasonable and careful reliance on copious documentation does not suffice to dispose of a hopeless libel charge by a public figure because of suspicions about the writer's "state of mind" on tangential bits and pieces of the story, as in the present case (compare opinion below with that of the district court, 562 F. Supp. 201, 208-09 (D.D.C. 1983)), something is amiss. The heightened standard of proof established in *New York Times* should go hand in hand with the plenary procedural protection afforded by the summary judgment motion so that the substantive protections do not "operate[ ] too late in the litigation process" to vindicate the First Amendment rights that are at stake. Anderson, *Libel and Press Self-Censorship*, 53 Tex. L. Rev. 422, 456 (1975); Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 Hofstra L. Rev. 655, 687-720 (1979).

The necessity for uncompromising application of summary judgment principles in testing the libel plaintiff's case can thus be justified on both practical and constitutional grounds. There is no point in clogging the courts with trials that lead to verdicts that must regularly be reversed. Summary judgment provides a full-blown opportunity to assay the sufficiency of plaintiff's case and is intended to screen out those not warranting trial. And, to the extent that the trials and unsupportable verdicts resulting from any supposed presumption disfavoring summary judgment become merely devices to punish or tax constitutionally protected speech that juries find objectionable, the result is an unconstitutional burden on freedom of expression.

CONCLUSION

The Court should rule that a judge, in denying a defendant's summary judgment motion in a libel suit by a public figure, must conclude that based on the evidence elicited by the plaintiff a reasonable jury could find actual malice with convincing clarity. It should therefore reverse the contrary holding of the Court of Appeals and its mistaken analysis of the facts based on that holding.

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APPENDIX

The Individual *Amici*

The American Newspaper Publishers Association is a national trade association of nearly 1,400 newspapers, representing about 99% of the daily newspaper circulation in the United States.

The American Society of Newspaper Editors is a nationwide professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over 50 years ago, include ongoing efforts to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The Association of American Publishers, Inc. ("AAP"), a not-for-profit trade association organized under the laws of the State of New York, is the major national association of book publishers in the United States. AAP's approximately 325 members include most of the leading commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish in the aggregate a majority of all general and educational books published in the United States.

CBS Inc., through its CBS News Division, is engaged in the nationwide dissemination of news over the facilities of the CBS Television and Radio Networks. In addition, CBS provides extensive news coverage through its five owned television stations, and thirteen owned AM and FM radio stations. The CBS Publishing Group publishes numerous nationally distributed magazines and hard-cover books.

The Chicago Tribune Company, a subsidiary of Tribune Company, publishes the *Chicago Tribune*, the largest-circulation metropolitan daily and Sunday newspaper in Illinois.

Dow Jones & Company, Inc. publishes, *inter alia*, *The Wall Street Journal*, *Barron's National Business and Financial Weekly*, a variety of national and international electronic news services, textbooks through its Richard D. Irwin, Inc. subsidi-

ary, and 22 community daily newspapers through its Ottaway Newspapers, Inc. subsidiary.

The Hearst Corporation is a diversified privately-held company which is engaged in a broad spectrum of commercial activities including communications. It publishes nationally distributed magazines, newspapers and hard-cover and soft-cover books, and it owns and operates a leading feature syndicate, television and radio broadcast stations and cable television systems.

The Magazine Publishers Association is a national industry association which represents 242 publishing firms that publish 1,150 different magazines, journals of literature and opinion and special interest publications on numerous subjects including politics, business, corporate, product and consumer information.

The Miami Herald Publishing Company is an unincorporated division of Knight-Ridder Newspapers, Inc., which publishes *The Miami Herald*, a daily newspaper of general circulation throughout Florida.

National Broadcasting Company, Inc., a wholly owned subsidiary of RCA Corporation, is engaged in the broadcasting business. It owns and operates five television stations, a television network, eight radio stations and a radio network.

Newsweek, Inc. publishes a weekly international news magazine, *Newsweek*.

The New York Times Company publishes *The New York Times*, 33 other newspapers of local or regional circulation, and the national magazines *Family Circle*, *Golf Digest*, *Tennis* and *Cruising World*. The New York Times Company also owns three television stations, two radio stations and cable TV systems.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors, dedicated to the protection of the First Amendment interests of the media and the public. The Reporters Committee has provided representation, legal guidance and research in major press freedom cases since 1970.

The Society of Professional Journalists, Sigma Delta Chi is a voluntary, not-for-profit organization of nearly 28,000 members representing every branch and rank of print and broadcast journalism. The Society's purposes, expressed by its founders in 1909, include "work to safeguard the flow of information from all sources to the public so that it has access to the truths required to make democracy function and to protect our freedoms."

Time Incorporated is the largest publisher of general circulation magazines in the United States. It publishes TIME, FORTUNE, SPORTS ILLUSTRATED, PEOPLE, MONEY, LIFE and DISCOVER.

The Times Mirror Company is the publisher of the *Los Angeles Times* and seven other metropolitan and community newspapers.

Westinghouse Broadcasting and Cable, Inc. owns and operates 16 broadcasting stations, including three all-news radio stations, as well as THE NEWSFEED NETWORK, one of the largest syndicated news services providing hard news and news features to over 70 local U.S. television stations.